SENATE JUDICIARY
Exhibit No. 28
Date 2-20-09
Bill No. SB 435

STATEMENT OF R. BLAIR STRONG
OPPOSING SB 435

Mr. Chairman, Members of the Committee: My name is Blair Strong, and I am presenting a statement opposing SB 435.

I testified one week ago recommending that your committee issue a do not pass recommendation on SB 377. SB 435 concerns a similar topic and is directed quite explicitly at seizing or damaging power generation rights in general, and Avista's water rights associated with its Noxon Rapids Dam on the Clark Fork River, in particular.

Nearly twenty years ago, the Montana Water Court conducted an evidentiary hearing on Avista's pre-1973 water rights, and Water Judge Holter issued an order that set forth those rights. Throughout its fifty year history of doing business in Montana, Avista has observed the water rights laws, just like any other water user.

From my perspective as an attorney who has represented Avista in Montana on water rights issues, there are a multitude and constitutional problems with the SB 435. It should be pointed out that it is virtually the same bill that Senator Jackson introduced two year ago in the House of Representatives as HB 360, and that was tabled in committee. The defects with SB 435 are nearly identical to those of HB 360:

1. In Montana, water rights have been held to be property rights under the Montana Constitution. The "first in time, first in right" rule has been the law in Montana since it was a territory. SB 435 would in effect "take" the most valuable part of the water right - the priority date - without compensating the property owner. The proposal would violate both the Montana and the U.S. Constitutions.

2. The bill would set a dangerous precedent. If the State can expropriate the value of a water right from a power generator, it can also expropriate the water right of irrigators or homeowners, or anybody by mere legislative enactment.

3. The bill is an illegal effort to amend the Montana Constitution by statute. The 1972 Montana Constitution "confirmed" existing Water Rights, and created no priorities between types of rights. The 1889 Montana Constitution gave no priority to types of water uses – all types of water use were considered equal in the eyes of Montana law. If Montana wants to establish a system of priorities among types of rights, then it would have to amend its constitution. Even then, Montana could not subordinate and in effect take without compensation a right that pre-existed the amendment.

For instance, let me give you an example. Idaho has a system that gives a preference, when the waters of a stream are not sufficient for all users, first to domestic uses, then to mining in organized mining districts, then to agriculture, finally to manufacturing. But usage is subject to the taking provisions of the Idaho Constitution which means that that if you exercise your preference rights, for instance as a domestic user, you still have to compensate the preexisting water right user for taking that person's right. This preference system was enacted in the original 1889 Idaho Constitution. Additionally, in 1928 Idaho amended its Constitution to provide that the State could regulate and limit the use of Idaho's waters for power purposes. The 1928 amendment applied to power projects developed after 1928, but has not been understood as affecting water rights that preexisted 1928. Montana clearly went down a different path when the people of Montana approved Constitutions that did not prioritize between

types of water usage. Even a properly drawn Constitutional amendment, could not impair or take preexisting water rights without just compensation.

In addition, there are attributes of SB 435 that render that bill constitutionally infirm:

1. SB 435 orders the Water Court to reopen prior decrees and subordinate power generators water rights. However, the Water Court is a part of the judiciary. The Legislature cannot order a judge to enter a particular decree without unconstitutionally invading the judicial power. Moreover, participants in the water right adjudication process are entitled to due process of law, just like in any other judicial proceeding. Their due process rights would be invaded unconstitutionally if the Water Judge were ordered to go back and retroactively subordinate their water rights, and disregard the evidence presented in earlier hearings in order to arbitrarily establish a different priority date.

2. SB435 is focused on power generation rights. The text refers more generally to power generation rights, without distinguishing about types of power generation. The bill appears to say that all power generation rights are subordinate to all other rights; however it preserves a system of priority as between hydroelectric power rights. In any event, there is no rational and constitutional distinction between uses of water for power generation purposes and uses of water for other purposes, such as manufacturing or industry. Therefore by treating power generation water users or hydroelectric rights differently from those of other water right users, SB 435 would deny power generation water users of their right to the equal protection of the law, and thereby violate the Montana and the United States Constitutions.

3. As I noted SB 435 as written appears to apply to virtually all types of power generation, because almost all (except wind and solar) generation technologies require some water. Therefore, water rights associated with new power projects would be subordinated, and new power generation plants could not acquire rights that had any enforceability. Even if a new plant purchased existing agricultural rights, by operation of this bill, the newly acquired rights would likely be subordinate to all other rights when they were changed to power generation purposes. This may result in a severe disincentive to build generation projects in Montana, if new projects cannot obtain predictable and enforceable water rights. On the other hand, if water rights acquired by purchase are not subordinated when changed to power production purposes, then SB 435 results in another equal protection problem - with water rights acquired by purchase being treated differently from water rights acquired by use.

4. SB 435 attempts to create an exception for regulatory requirements. Section 1 says that water rights, "may not be reduced in flow or volume to an extent the owner would not be able to meet the regulatory requirements in the license issued to the owner by the Federal Energy Regulatory Commission" ("FERC"). But this exception only creates more ambiguity and will result in further disputes in the future. For instance, one of the criteria that FERC referred to in its licensing order for Avista's Clark Fork Project was that Avista "should be able to continue to serve its customers efficiently and reliably over the term of the license." Also, FERC held that the Clark Fork Project displaces the need for other power plants to operate and thereby avoids the creation of greenhouse gases. Arguably the obligation to produce electricity efficiently is a "regulatory requirement" and

Avista may be obligated by its license to protect its rights as opposed to resorting to generating technologies that generate green house gases.

Many of these issues will have to be ironed out in the courts, if either SB 435 passes. I recommend that the committee adopt a do not pass recommendation. Thank-you.

2005 Montana Legislature

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HOUSE BILL NO. 360

INTRODUCED BY V. JACKSON

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT POWER GENERATION WATER RIGHTS ARE SUBORDINATE WITH REGARD TO PRIORITY DATE TO ALL OTHER WATER RIGHTS IN MONTANA; REQUIRING THE WATER COURT TO MAKE NECESSARY AMENDMENTS TO DECREED WATER RIGHTS; AMENDING SECTION 85-2-237, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Power generation water rights junior to other water rights.** (1) Subject to subsection (2), power generation water rights are junior in priority date to all other water rights in Montana.

(2) Power generation water rights that are held by entities licensed through the federal energy regulatory commission or that are appurtenant to structures that are licensed through the federal energy regulatory commission may not be reduced in flow or volume to an extent that the owner would not be able to meet the regulatory requirements in the license issued to the owner by the federal energy regulatory commission.

Section 2. Section 85-2-237, MCA, is amended to read:

"85-2-237. Reopening and review of decrees. (1) After July 1, 1996, the water judges shall by order reopen and review, within the limits set forth by the procedures described in this section, all preliminary or final decrees:

(a) that have been issued but have not been noticed throughout the water divisions; ~~or~~

(b) for basins for which claims have been filed under 85-2-221(3); or

(c) for basins that contain power generation water rights.

(2) (a) Each order must state that the water judge will reopen the decree or decrees and, upon a hearing, review the water court's determination of any claim in the decree or decrees if:

(i) an objection to the claim has been filed for the purpose of protecting rights to the use of water from sources:

~~(i)~~(A) within the basin for which the decree was entered; or

~~(ii)~~(B) in other basins that are hydrologically connected to sources within the basin for which the decree was entered~~.~~; or

(ii) a claim was filed in that basin for the purpose of power generation.

(b) A person may not raise an objection to a matter in a reopened decree if the person was a party to the

matter when the matter was previously litigated and resolved as the result of the previous objection process, unless the objection is allowed for any of the following reasons:

(i) mistake, inadvertence, surprise, or excusable neglect;

(ii) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), Montana Rules of Civil Procedure;

(iii) fraud, misrepresentation, or other misconduct of an adverse party;

(iv) the judgment is void;

(v) any other reason justifying relief from the operation of the judgment.

(c) The objection must be made in accordance with the procedure for filing objections under 85-2-233.

(3) The water judges shall serve notice by mail of the entry of the order providing for the reopening and review of a decree or decrees to the department and to the persons entitled to receive service of notice under 85-2-232 (1).

(4) Notice of the reopening and review of a preliminary or final decree must also be published at least once each week for 3 consecutive weeks in at least three newspapers of general circulation that cover the water division or divisions in which the decreed basin is located.

(5) No objection may cause a reopening and review of a claim unless the objection is filed with the appropriate water court within 180 days after the issuance of the order under subsection (1). This period of time may, for good cause shown, be extended by the water judge for up to two 90-day periods if an application for extension is made within the original 180-day period or any extension of it.

(6) The water judge shall provide notice to the claimant of any timely objection to the claim and, after further reasonable notice to the claimant, the objector or objectors, and other interested persons, set the matter for hearing. The water judge may conduct individual or consolidated hearings, and any hearing must be conducted according to the Montana Rules of Civil Procedure. On an order of the water judge, a hearing may be conducted by a water master, who shall prepare a report of the hearing as provided in Rule 53(e), Montana Rules of Civil Procedure.

(7) The water judge shall, on the basis of any hearing held on the matter, take action as warranted from the evidence, including:

(a) dismissal of the objection or modification of the portion of the decree describing the contested claim; or

(b) (i) changing the priority date of any power generation water rights to the most junior status allowable without violating the power generation water right owner's requirements under a federal energy regulatory commission license; and

(ii) modifying the decree to reflect this change in priority date.

(8) An order or decree modifying a previously issued final decree as a result of procedures described in this

section may be appealed in the same manner as provided for an appeal taken from a final order of a district court.

(9) An order or decree modifying a previously issued preliminary decree as a result of procedures described in this section may be appealed under 85-2-235 when the preliminary decree has been made a final decree."

NEW SECTION. **Section 3. Definition.** As used in [sections 1 and 3] and 85-2-237, "water right" means the right to use water as documented by a claim to an existing right, a permit, or a certificate of water right.

NEW SECTION. **Section 4. Codification instruction.** [Sections 1 and 3] are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions of Title 85, chapter 2, part 2, apply to [sections 1 and 3].

NEW SECTION. **Section 5. Effective date.** [This act] is effective upon passage and approval.

- END -

Latest Version of HB 360 *(HB0360.01)*

Processed for the Web on January 19, 2005 (4:51pm)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted.

See the status of this bill for the bill's primary sponsor.

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Prepared by Montana Legislative Services

(406) 444-3064